



## Marco v. Accent Publishing Co., 969 F.2D 1547 (3D Cir. 1992)

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## CASE SUMMARIES

### **Marco v. Accent Publishing Co.,**

969 F.2D 1547 (3D CIR. 1992).

#### *Introduction*

Plaintiff Ed Marco (“Marco”), a freelance photographer, sought to enjoin defendant Accent Publishing Co., Inc. (“Accent”), a magazine publisher, from reproducing his photographs without a license. The United States District Court for the Eastern District of Pennsylvania denied the injunction, holding that the photographs were works for hire and that the copyrights thus belonged to the publisher. The United States Court of Appeals for the Third Circuit reversed, holding that Marco was an independent contractor and that the photographs were therefore not works for hire.

#### *Facts*

Accent publishes a magazine for the costume jewelry industry. Accent retained Marco without a written contract and without negotiating any terms regarding copyright. Marco provided photographs for 6 to 8 consecutive issues of the magazine. He shot the pictures in his own studio on his own time, subject to Accent’s deadlines. He worked primarily on still-lives, without anyone from Accent present. On a few occasions, Accent provided live models and Accent’s art director posed them. The art director admitted that he did not supervise the technical aspects of the photographs. Marco was paid \$450.00 for each issue for which he worked. Accent did not withhold taxes or pay employee benefits, and it reimbursed Marco for film and processing.

Marco claimed that he created the photographs as an independent contractor, and that he therefore owned the copyrights. He sought a preliminary injunction to prevent their unlicensed reproduction. The district court ruled that Marco was Accent’s employee, that the photographs were therefore works for hire, and thus the copyrights belonged to Accent. Marco appealed.

#### *Legal Analysis*

The issue before the Court of Appeals for the Third Circuit was whether Marco was an independent contractor or an Accent employee. If he was an employee, then the photographs were “made for hire” and the copyrights belonged to Accent. If Marco was an independent contractor, then the photographs were not “made for hire” and the copyrights belonged to Marco.

The ‘work for hire’ provision of the Copyright Act states that works are “made for hire” if they are “prepared by an employee within the scope of his or her employment.”<sup>1</sup> The Supreme Court addressed the meaning of “employee” as it is used in the ‘work for hire’ provision in *Community for Creative Non-Violence v. Reid* (“CCNV”).<sup>2</sup> In that case, a charity hired Reid to create a sculpture. After completion, a dispute arose over certain rights in the work. The Supreme Court held that the sculpture was not a work for hire because Reid was not the charity’s employee.<sup>3</sup> The court reasoned that the term “employee” should be construed according to common law agency principles.

Thus the CCNV court incorporated the Restatement definition of “employee” into its test to determine whether an employment relationship exists. A court applying this test must therefore consider:

the hiring party’s right to control the manner and means by which the product is accomplished, along with the following factors, among others: actual control over the details of the work, the hired party’s occupation, local custom, the skill required, source of tools, work location, length of employment, the right to assign more work, the hired party’s discretion over work hours, payment method, the regular business of the hiring party, the parties’ understanding, the hiring party’s role in hiring assistants, tax treatment, employee benefits, and whether the hiring party is in business.<sup>4</sup>

The appellate court applied these factors to the present case and found that Marco was an independent contractor. According to the appellate court, the district court recognized only two factors which showed that Marco was an independent contractor. First, that Marco used his own equipment, and second, that he paid his own taxes. The district court did not address four other factors that weighed in favor of Marco’s independent contractor status. These factors included the following: Marco supplied his own studio, he did not receive employee benefits, he worked in a distinct occupation, and he was paid by the job.

There were other factors which the district court neglected that showed Marco’s independent status. First, the district court did not properly recognize that Marco had discretion over his work hours; he could work on any day, at any hour, and for any stretch of time he chose. Furthermore, the district court did not address Accent’s absence of a right to assign more work to Marco. Accent’s right to have Marco reshoot unsatisfactory photos was a right of final approval, not a right to assign more work.

The district court also incorrectly held that no special skill was required to be a magazine photographer. The appellate court, however, held that more than mere ownership of a camera was required to be a magazine photographer. The appellate court noted that Accent hired Marco because he was a professional, based upon his portfolio. They did not merely pick him off the street.

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1. 17 U.S.C.A. § 101(1)(1976).

2. 490 U.S. 730 (1989).

3. *Id.* at 751-52.

4. RESTATEMENT (2D) AGENCY § 220(1) et seq.

Another factor which the district court overlooked was the length of the relationship. The district court held that because Marco made photographs for Accent for six months that Marco was an employee. But the appellate court held that this factor only provides weak evidence of an employment relationship because the duration of a relationship only indicates an employment relationship when the work is scheduled and periodic, or full-time.<sup>5</sup>

The most compelling evidence in favor of Marco's employee status is that Accent had control over the details of the work: Accent supplied jewelry, props, models, sketches intended to describe the exact composition of the photographs, and, at some sessions, an art director. However, the appellate court held that this factor is not dispositive, since it resembles the "control of the product" test rejected by the Supreme Court in *CCNV*.<sup>6</sup> Accent controlled only the subject matter and composition of the images, not the light sources, filters, lenses, camera, film, perspective, aperture setting, shutter speed, and processing techniques. In fact, Accent's art director admitted that he attended only the live sessions, and gave input only on the feel of the images.

Overall, the appellate court compared the present case to *CCNV* and found the two cases similar. According to the court, Accent's control of the product was no greater than the control exercised by the charity in *CCNV*, who articulated the subject and composition, supplied models, occasionally supervised the work, constructed part of the sculpture, and was still not an employer. The only significant difference which the appellate court noted between the present case and *CCNV* was that the hiring party in the present case was in the business of regularly publishing photographs in connection with advertisements and articles, and the charity in *CCNV* was not in the business of commissioning sculptures. However, the appellate court held that this distinction alone does not give rise to an employment relationship.

### *Conclusion*

In summary, the Third Circuit held that a magazine publisher's regular practice of commissioning photographs of its own conception does not create an employment relationship with an experienced photographer who uses his own equipment; who works at his own studio, without photography assistants hired by the publisher; and who receives payment without income tax withheld, without employee benefits, for discrete assignments rather than for hourly or periodic work. In the absence of an employment relationship, the resulting photographs cannot be considered "made for hire," and thus any applicable copyrights belong to the photographer.

*Douglas W. Michaud*

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5. RESTATEMENT SECOND OF AGENCY § 220 cmt. h (1957)(factors indicating employment relationship include "employment over a considerable period of time *with regular hours*") (emphasis added).

